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No. 84-316

In the Supreme Court of the United States

OCTOBER TERM, 1984

KYLE KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars successive prosecutions for conspiracy and a substantive offense occurring in the course of the conspiracy.

2. Whether the Double Jeopardy Clause bars a prosecution for a substantive violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(c), where the charged acts of racketeering were substantive offenses that occurred in the course of a conspiracy for which the defendant was previously prosecuted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 734 F.2d 194.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on May 29, 1984. A petition for rehearing was denied on June 28, 1984 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that his prosecution in this case for substantive drug and racketeering offenses violated the Double Jeopardy Clause because those offenses occurred in the course of a conspiracy for which petitioner had previously been convicted. The district court rejected this contention, and, on petitioner's interlocutory appeal, the court of appeals affirmed (Pet. App. 1a-12a).

1. In January 1980, petitioner and 35 co-defendants were indicted in the Southern District of Texas — the so-called *Mr. Jake* indictment (No. G-80-3) (Pet. App. 16a-20a) —for drug offenses arising out of their unsuccessful effort to smuggle 100,000 pounds of marijuana into the United States from the load ship *Mr. Jake* on December 19, 1979. Following a jury trial, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it (Count II) and possession of marijuana with intent to distribute it (Count III); he was acquitted of conspiracy to import marijuana (Count I) (E.R. 10).[1] The court of appeals subsequently affirmed petitioner's convictions without opinion. See *United States* v. *Saa-Hinestorza*, 689 F.2d 190 (5th Cir. 1982) (Table).[2]

2. a. Subsequently to the *Mr. Jake* prosecution, the government received additional information linking petitioner to a large-scale marijuana smuggling venture operating out of Miami and coordinated by the Jose Fernandez organization. As part of this venture, the organization headed by petitioner's brother Steven Kalish, of which petitioner was a member, was regularly used to off-load shipments of imported marijuana.

Based on this additional information, the 20-count indictment (No. B-83-18-Cr.) in the instant case was returned in the Eastern District of Texas on June 28, 1983

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[1]"E.R." refers to the Excerpts of Record in the instant appeal; "R.A." refers to the Record on Appeal; "S.R." refers to the Supplemental Record.

[2]The evidence underlying the *Mr. Jake* prosecution is summarized in *United States* v. *Kalish*, 690 F.2d 1144, 1148-1150 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983). Briefly stated, it showed that petitioner's brother, co-defendant Steven Kalish, met with Tommy Troutwein, a marina manager and confidential informant, between August and December, 1979, to arrange for the offloading of a mother ship carrying marijuana. For his part, petitioner participated in the offloading of the *Mr. Jake* on December 19, 1979.

(Pet. App. 23a-33a). This indictment charged petitioner and 44 co-defendants with various offenses for their participation in a widespread and continuing marijuana importation and distribution enterprise that was in operation between November 1978 and November 1980. In pertinent part, petitioner was charged with distributing and possessing with intent to distribute 48,000 pounds of marijuana on December 3, 1979 (Count V), in violation of 21 U.S.C. 841(a)(1), and importing the same quantity of marijuana (Count X), in violation of 21 U.S.C. 952; these counts were based on a seizure of the marijuana at a farm near Jasper, Texas. Petitioner was also charged with participating in the affairs of an enterprise through a pattern of racketeering activity (Count I), in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). As predicate acts of racketeering, the substantive RICO count alleged that petitioner aided and abetted the importation of 30,000 pounds of marijuana in May 1979 and that he imported, possessed, and distributed 48,000 pounds of marijuana on December 3, 1979 (Pet. App. 27a-30a). The offenses charged in the *Mr. Jake* indictment were not alleged as predicate acts in the RICO count.[3]

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[3]The indictment also listed petitioner as a participant in the importation of 11,000 pounds of marijuana on May 27, 1979 (Act of Racketeering No. 5, ¶¶ (h) and (i); E.R. 11); however, his involvement in this transaction was not alleged as a predicate act in the RICO count. See I R.A. 12.

In addition to these substantive drug and RICO offenses, petitioner was also charged with conspiracy to distribute (Count XIII) and to import (Count XIV) marijuana between November 1978 and November 1980, in violation of 21 U.S.C. 846 and 963, and with conpiracy to participate in the affairs of an enterprise through a pattern of racketeering activity (Count II), in violation of 18 U.S.C. 1962(d). The government conceded that prosecution on the drug conspiracies charged in Counts XIII and XIV was barred by double jeopardy (see I R.A. 184, 186; I S.R. 8-9), and the district court dismissed these counts at the government's request (I R.A. 253). Without conceding that the RICO

b. Prior to trial, petitioner moved to dismiss the instant indictment on double jeopardy grounds. He argued that the prosecution was constitutionally barred because of the previous trial on charges of conspiring to import, possess, and distribute marijuana (I R.A. 131-138). After a hearing, the district court denied petitioner's motion to dismiss the substantive RICO and controlled substances counts (I R.A. 253). The court found petitioner's challenge to the substantive RICO charge to be "completely devoid of merit" since

> [u]nder this charge, [petitioner] is accused of having furthered [a] criminal enterprise through a pattern of racketeering activity. Such being the case, the overt acts mentioned do not stem from predicate substantive crimes, but rather the furthering of the illegal business enterprise. In essence, a RICO substantive charge alleges the commission of on-going, continuing criminal activity as opposed to the commission of any specific predicate offense.

I R.A. 257.[4]

The court found "equally frivolous" petitioner's attack on the substantive distribution and importation counts arising from the marijuana smuggling activity on December 3, 1979 (I R.A. 257). As the court explained, reference to the December 3 transaction "is completely absent from the 'Mr. Jake' * * * record[]"; accordingly, the instant substantive

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conspiracy count was necessarily barred by double jeopardy, the government also moved to dismiss Count II in order to eliminate any potential litigating problems (I R.A. 188), and the district court granted this motion (I R.A. 253).

[4]As the court also noted at the hearing (II R.A. 14), petitioner

> ha[d] never been charged or convicted in any Court * * * of any substantive conduct arising out of the May [1979] incident alleged in the act of racketeering, nor has he ever been tried or convicted of any conduct arising out of the December 3rd transaction alleged in the indictment.

counts "are completely distinct from those [on] which [petitioner] w[as] either convicted or acquitted in earlier proceedings" (I R.A. 257-258). The court also rejected petitioner's claim that all possible charges relating to a single conspiracy must be brought in one prosecution (I R.A. 258-259):

> The law is clear and without challenge as to the separate prosecution of a conspiracy and the underlying substantive offense arising out of the conspiracy. The prosecution of a conspiracy is distinct from that of the substantive offense; and prosecution of one will not bar prosecution for the other.

Thereafter, the district court denied petitioner's motion for reconsideration (I R.A. 260) but stayed further proceedings and certified an interlocutory appeal (I R.A. 267), stating that petitioner's argument that all charges growing out of the same transaction must be tried together, "though without support of precedent," was "non-frivolous" (I R.A. 260). See *Richardson* v. *United States*, No. 82-2113 (June 29, 1984), slip op. 5-6, 9 n.6; *Abney* v. *United States*, 431 U.S. 651 (1977); *United States* v. *Dunbar*, 611 F.2d 985 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

c. On petitioner's appeal, the court of appeals affirmed the district court's order rejecting petitioner's double jeopardy challenges to the substantive drug and racketeering counts in the indictment (Pet. App. 1a-12a). The court observed that the substantive drug offenses in this case and in the *Mr. Jake* prosecution "are entirely distinct" (*id.* at 5a); the former "stem from a seizure of 48,000 pounds of marijuana at a farm near Jasper, Texas on December 3, 1979," while the latter "arose from the MR. JAKE seizure on December 19, 1979" (*id.* at 4a). In addition, even assuming that the Jasper farm substantive offenses in this case were among the objects of the conspiracy for which petitioner was prosecuted in the *Mr. Jake* case (*id.* at 5a n.4), the

court held that successive prosecutions for conspiracy and a substantive object offense do not violate double jeopardy (*id.* at 8a; citation omitted):

> [N]o court in this country has ever held that a defendant may not be indicted and tried once for a conspiracy and thereafter tried for the crime of distributing controlled substances * * *. A conspiracy to commit a crime and the crime itself are separate offenses and a defendant may be tried in separate trials for these offenses.

Finally, the court concluded that the *Mr. Jake* prosecution for conspiracy did not bar the substantive RICO count here; because there was no double jeopardy problem with the substantive drug offenses alleged as acts of racketeering, "no derivative double jeopardy problems attach to the RICO charge" (*id.* at 12a).

ARGUMENT

1. Petitioner contends that the Double Jeopardy Clause bars successive prosecutions for conspiracy and a substantive offense that occurred in the course of the conspiracy. However, double jeopardy prevents two proceedings only where they involve "the same offense."[5] This Court[6] and the courts of appeals[7] have long recognized that conspiracy and

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[5]See, *e.g.*, *United States* v. *Ewell*, 383 U.S. 116, 124-125 (1966).

[6]See, *e.g.*, *Jeffers* v. *United States*, 432 U.S. 137, 156-157 (1977) (plurality opinion); *Iannelli* v. *United States*, 420 U.S. 770, 777-779, 785-786 n.17 (1975); *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); *Carter* v. *McClaughry*, 183 U.S. 365 (1902).

[7]See, *e.g.*, *United States* v. *Nichols*, No. 83-3511 (5th Cir. Sept. 17, 1984), slip op. 5662-5663; *United States* v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Bosch*, 584

substantive offenses are not the same for double jeopardy purposes. Indeed, this rule applies even where the substantive offense is both alleged as an overt act for the conspiracy and charged as a separate count in the indictment.[8] Accordingly, the *Mr. Jake* prosecution on the conspiracy offense and the Jasper prosecution on the substantive drug offenses were not unconstitutional.

Petitioner nowhere mentions this settled double jeopardy principle. Instead, relying (Pet. 16-19) on two concurring opinions of Justice Brennan,[9] he argues that the Double Jeopardy Clause requires all charges arising out of "the same transaction" to be brought in a single proceeding. However, "[i]t is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause." *Albernaz* v. *United States*, 450 U.S. 333, 344-345 n.3 (1981). The defendant is not subjected to double jeopardy where "the transaction charged is the same in each case * * * [but] the offenses are separate. * * * 'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.' " *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911)

F.2d 1113, 1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 918-920 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Inmon*, 568 F.2d 326, 329-333 (3d Cir. 1977); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Ricco*, 549 F.2d 264, 272-273 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

[8]See *Pinkerton* v. *United States*, 328 U.S. at 644.

[9]See *Harris* v. *Oklahoma*, 433 U.S. 682, 683 (1977) (Brennan, J., concurring); *Abbate* v. *United States*, 359 U.S. 187, 196-201 (1959) (separate opinion of Brennan, J.).

(citation omitted). As Justice Brennan has recognized,[10] the Court has never adopted the "same transaction" test.[11] Petitioner has offered no reason for the Court to revisit this issue or to reconsider the well-established doctrine that conspiracy and substantive crimes are different offenses that may be prosecuted in separate proceedings.

Indeed, petitioner's position is especially unsound here. First, the substantive drug offenses with which petitioner was charged occurred in different judicial districts (see Pet. App. 19a, 30a, 32a) and therefore could not have been joined in one venue. Moreover, the instant prosecution was based on "additional information" (Pet. App. 3a) that the government received after the *Mr. Jake* prosecution had been concluded. In these circumstances, as we discuss in our brief on the merits (at 38-45) in *Garrett* v. *United States*, cert. granted, No. 83-1842 (Oct. 1, 1984),[12] the Double Jeopardy Clause would not bar successive prosecutions even if it contained a "same transaction" requirement.

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[10]See *Borchardt* v. *United States*, cert. denied, No. 83-1643 (Oct. 29, 1984), slip op. 4, 5 n.3 (Brennan, J., dissenting); *Thompson* v. *Oklahoma*, cert denied, 429 U.S. 1053 (1977) (Brennan, J., dissenting).

[11]For example, the Court's decision in *Illinois* v. *Vitale*, 447 U.S. 410 (1980), recognized that offenses involving the same transaction were not required to be prosecuted together if they were neither greater-and-lesser nor compound-predicate offenses under state law. Similarly, in *Harris* v. *Oklahoma, supra*, the Court, in setting aside a conviction for the underlying felony following a prosecution and conviction for felony-murder, did not suggest in any way that offenses growing out of the same transaction had to be joined in one trial (cf. *Whalen* v. *United States*, 445 U.S. 684, 694 (1980)); on the contrary, Justice Brennan's concurring opinion (433 U.S. at 683) makes clear that the Court's decision did not rest on the "same transaction" test. See also, *e.g.*, *United States* v. *Brooklier*, 637 F.2d 620, 624 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *United States* v. *Dunbar*, 591 F.2d 1190, 1192 (5th Cir. 1979), aff'd, 611 F.2d 985, 987 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

[12]A copy of our brief in *Garrett* is being sent to counsel for petitioner.

However, because prosecutions for conspiracy and a substantive offense do not violate double jeopardy even apart from this argument, the Court need not defer consideration of petitioner's contention pending the decision in *Garrett*.

Finally, petitioner argues that the decision below conflicts with *United States* v. *Beachner Const. Co.*, 729 F.2d 1278 (10th Cir. 1984). There, the defendant was initially indicted on one count of conspiracy to rig a contract bid, in violation of the Sherman Act (15 U.S.C. 1), and on one count of mail fraud in furtherance of that bid-rigging, in violation of 18 U.S.C. 1341; these charges related to a specified state highway construction project. Following acquittal on those charges, the defendant was indicted on three counts of conspiracy to rig bids and three counts of mail fraud in furtherance thereof; these charges related to three state construction projects that had not been involved in the first prosecution. The court of appeals held that there had been one overall conspiracy that encompassed the various bid-rigging incidents, and accordingly it held that the two sets of conspiracy charges constituted the same offense and could not be successively prosecuted. In addition, the court held that the second set of mail fraud counts was also barred. As one of the alternative grounds for this decision,[13] it stated that the mail fraud counts "were an integral part of the alleged bid-rigging scheme" and were "encompassed in the Sherman Act bid-rigging conspiracy charges" (729 F.2d at 1284); since "in order for the government to prove the mail fraud charges made in [the second prosecution] it *must* also prove the conspiracy alleged in the Sherman Act counts" (*ibid.*; emphasis in original), and since that conspiracy was the same offense as that tried in the first proceeding, the court held that the second set of mail fraud counts

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[13]The court also concluded (729 F.2d at 1284) that the government failed to preserve its arguments in the district court.

was equally precluded by double jeopardy as the second set of conspiracy charges. Relying on this ruling, petitioner argues that his prosecution for substantive drug offenses was likewise improper in light of his earlier prosecution for conspiracy.

While we believe that the decision in *Beachner* is manifestly incorrect in view of the authorities discussed earlier, it does not conflict with the court of appeals' decision below. The court in *Beachner* did not discuss, let alone put in doubt, the firmly settled proposition that conspiracy and substantive offenses are not the same under the Double Jeopardy Clause. Rather, the court found that the government, in order to prove the mail fraud counts in the second proceeding, had to establish as an essential part of its case the Sherman Act conspiracy violations that could not be directly prosecuted. In effect, the court appeared to interpret the mail fraud charges to be a form of compound-predicate offense in which proof of the underlying bid-rigging conspiracy was necessary to show the scheme to defraud (see 729 F.2d at 1284); absent the conspiracy, the mailings would not have been fraudulent. Here, on the other hand, it is not essential to the substantive drug charge that petitioner was engaged in the *Mr. Jake* conspiracy; while the government's evidence may tend to demonstrate such a conspiracy, that is not a necessary part of its burden. For this reason, the relationship between the offenses at issue here is fundamentally different from that in *Beachner*, and the decisions do not create a conflict that warrants further review in this case.

2. Petitioner also argues that, because the substantive drug offenses could not be separately prosecuted, they likewise could not serve as the acts of racketeering for the substantive RICO charge in this case. As discussed above, however, the Double Jeopardy Clause did not bar the substantive drug counts, and therefore petitioner's argument must fail.

Moreover, we agree with the suggestion of the court of appeals (Pet. App. 12a n.9) that the RICO count would be permissible even if the acts of racketeering could not be separately charged as substantive offenses. In our view, RICO and the predicate crimes are not "the same offense," and hence a defendant may be successively prosecuted for those substantive offenses and for RICO. This is similar to the issue of successive prosecutions for substantive drug offenses and engaging in a continuing criminal enterprise (21 U.S.C. 848), which is before the Court in *Garrett* v. *United States, supra*. As discussed in our brief in *Garrett* (at 14-32), a complex compound-predicate offense is not the same offense as the underlying substantive crimes. In line with this analysis, the courts of appeals have uniformly concluded that RICO and the acts of racketeering are separate offenses (see U.S. *Garrett* Br. 21 n.11, 48-49 n.42). Furthermore, all of the substantive drug charges against petitioner could not have been brought in one venue, and the instant prosecution was based on information that the government did not have at the time of the *Mr. Jake* proceeding (see page 8, *supra*). In this situation, as we discuss in our brief in *Garrett* (at 38-45), the Double Jeopardy Clause does not prohibit successive prosecutions.

It is unnecessary, however, for the Court to hold this petition pending decision in *Garrett*. As discussed above, the predicate acts of racketeering here are not offenses for which petitioner has previously been prosecuted. Thus, whatever the outcome in *Garrett*, petitioner's RICO prosecution would be valid. Nor is there a conflict among the circuits on the propriety of successive prosecutions for RICO and the substantive predicate offenses. Accordingly, the RICO issue raised by petitioner does not require this Court's review, and the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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